PERMODALAN MBf SDN. BHD.

v.

TAN SRI DATUK SERI HAMZAH ABU SAMAH & ORS.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 497 OF 1986]
2 NOVEMBER 1987

CIVIL PROCEDURE: *Injunction - Ex parte injunction granted by Judge at instance of appellant - Liberty to set aside or vary Court order - Inter partes application to set aside ex parte injunction pending - Application by respondent to suspend the effect of ex parte injunction pending hearing of inter partes application to set aside - Whether High Court has jurisdiction to suspend the effect of ex parte interim injunction.*

CIVIL PROCEDURE: *Jurisdiction - Question of inherent jurisdiction - Whether application to set ex parte injunction to be heard by same Judge who granted injunction.*

CIVIL PROCEDURE: *Judge - Whether same Judge who granted ex parte injunction to hear inter partes application to set aside order - Circumstances of case.*

This was an appeal from the decision of V.C. George J of the High Court, Kuala Lumpur, who held that the High Court has jurisdiction to suspend the effect of an *ex parte* interim injunction granted on 20 November 1986 by Zakaria J pending the hearing of an *inter partes* application before Zakaria J to have it set aside.

Held:

[1] There is no rule provided in the Rules of the High Court 1980 enabling the High Court to exercise its discretionary power to grant suspension or stay of execution of an interim injunction pending the disposal of the application to set it aside.

[2] There was no necessity at all for the order to suspend the injunction pending the hearing of the application to set it aside because it was tantamount to setting aside the injunction before the actual application is heard and might render a situation in which the Court would have to exercise its inherent powers to interfere in order to prevent an abuse of its process.

[Appeal allowed.]

Cases referred to:

London Permanent Benefit Building Society v. de Baer [1969] 1 Ch 34
Polini v. Gray [1879] 12 Ch D 438
Erinford Properties Ltd. v. Cheshire County Council [1974] 2 All ER 448
Shelfer v. City of London Electric Lighting Company [1895] 2 Ch 388

Legislation referred to:

Courts of Judicature Act 1964, s. 44.
Rules of the High Court 1980, O. 29 r. 1(1), (2), O. 32 r. 6, O. 45 r. 11, O. 47 r. 1, O. 55 r. 12, O. 92 r. 4
Rules of Supreme Court 1957 O. 93, r. 1(a)

For the appellant - Sri Ram; M/s. Joseph Tan & Tang
For the respondents 1, 2, 6, 7, 8 & 11 - Wong Weng Kwai (Chuah Mei Lin with him); M/s. Weng Kwai & Zaid

For the respondents 3, 4 & 5 - K.B. Thuraisingham; M/s. Clough Thuraisingham & Co.
For the respondents 9 & 10 - S. Achan; M/s. Tengku Mohd., Achan & Lim

JUDGMENT

Syed Agil SCJ:

We allowed this appeal on 17 July 1987 with the order that each party bear its own costs and promised to give our reasons later. We do so now.

The appeal arose from the decision of V.C. George J in the High Court Kuala Lumpur who held that the High Court has jurisdiction to suspend the effect of an *ex parte* interim injunction granted on 20 November 1986 pending the hearing of an application to have it set aside before Zakaria J. The said injunction at the instance of the plaintiff/appellant restrained Emtex Corporation Berhad (the 11th respondent) and its directors *viz.* the first to the eighth respondents respectively from functioning or performing any of the duties of directors or officers of the company and to refrain from completing and proceeding with the sale and purchase of shares of the ninth respondent by the eleventh respondent from the tenth respondent. It also appointed four new directors named therein to carry out the functions and duties of the board of directors and of the eleventh respondent until after the trial of the action. The former directors and the officers of the company were directed to hand over forthwith all correspondence, books of accounts and other relevant documents, belonging to the eleventh respondent to the four new directors who were required to prepare and lodge with the SAR monthly reports of and concerning the affairs of the eleventh respondent. The respondents or any of them were at liberty to apply to set aside or vary the court order upon summons *inter partes* served on the plaintiff/appellant or its solicitors not later than fourteen clear days from the return date of such *inter partes* summons. The respondents accordingly applied to have the injunction set aside but an early date could not be fixed for hearing until the second half of January 1987. Because of that, the respondents by summons-in-chambers dated 25 November 1986 applied to have the effect of the orders made by Zakaria J be stayed pending the hearing of the application to set it aside. The learned Judge heard the application at short notice but fell ill in the course of hearing it. V.C. George J took over and heard the said application. What the counsel for the respondents wanted, as noted by the learned Judge was

> to suspend the effect of the injunction pending hearing of the application to set aside which they hoped would be heard by Justice Dr. Zakaria Yatim in January.

On 22 November 1986 two days after the order of interim injunction the respondents obtained an *ex parte* order before the same Judge in chambers restraining the plaintiff/appellant whether by itself or its servants or agents from entering the premises of the eleventh respondent until the trial of the action or until the disposal of the application to set aside the order dated 20 November 1986.

There appeared to be two conflicting orders of injunction and the impression that V.C. George J had in perusing the documents before him was that the order dated 22 November 1986 tended to water down the effect of the order of 20 November 1986. In assessing the real position he continued:

> In the event, going by the documents before me, it seems to me the situation obtaining is most unsatisfactory. On the one hand, you have the original Board of Directors restrained from functioning as directors or officers of the company. On the other hand you have the 4

new directors appointed by the Court to take over and run the company. Yet there is the situation that they may not enter into the premises of the company. At best the whole situation is shrouded in uncertainty.

He then made an order suspending the effect of all the orders made on 20 November 1986 except for the first part which restrained the eleventh respondent whether by itself or by its servants or agents from completing, implementing or proceeding with the sale and purchase of shares of the ninth respondent from the tenth respondent until after the trial of the action. As a result the effect of all the orders was thereby lifted thus enabling the former directors to function and perform their duties without having to hand over all the correspondence, books of accounts and other relevant documents belonging to the eleventh respondent to the four new directors whose appointment as such by the former order was also suspended. The only restraint that was not lifted by the suspension was the refraining of the sale and purchase of shares as stated earlier and which, in our view, was the main issue in dispute between the parties.

We would like to express our view on the issue of the *ex parte* injunction at the instance of the respondents or the defendants in the Court below which was granted by the Judge on 22 November 1986. Although O. 29 r. 1(1) RHC 1980 enables any party to apply for an injunction either before or after trial of an action, O. 29 r. 1(2) thereof allows the plaintiff to apply for an *ex parte* injunction by summons supported by an affidavit, but only in the case of urgency. No such provision was included in the former Supreme Court Rules 1957 dealing with the same matter under O. 50. Order 29 is therefore a new provision introduced in the RHC which superseded the RSC 1957 by repeal as provided under O. 93 r. 1(a) of the former since 1 June 1980. In our opinion, an application for injunction under O. 29 r. 1(1) has to be heard *inter partes* thus enabling either the plaintiff or the defendant to apply "whether or not a claim for injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be". On the other hand, an *ex parte* application under sub-rule (2) may be made by the plaintiff and only in a case of urgency. Inter-party hearing appears to be the rule while an *ex parte* application for injunction appears to be the exception in the circumstances provided by sub-rules (2) and (3) and is to be allowed only in cases of urgency on the application of the plaintiff. Sub-rule (3) enables such application to be made before the issue of any writ or originating summons so long as the case is one of urgency. The Court is empowered to grant injunction on such terms as the issue of writ or summons or as it thinks fit. It seems therefore that the defendants cannot apply for an interim injunction *ex parte* but may do so *inter partes* under r. 1(1). In our considered judgment, the injunction dated 22 November 1986 should not have been granted.

Turning to the main issue, the learned Judge in granting the order suspending the *ex parte* injunction applied the principle based on English authorities. He quoted a passage by Plowman J in *London Permanent Benefit Building Society v. de Baer* [1969] 1 Ch 34 from the judgment of Cotton LJ in *Polini v. Gray* [1879] 12 Ch D 438. The principle *inter alia* says that where there is a reasonable ground of appeal and if not making the order to stay execution of the decree would render the appeal nugatory, i.e., it would deprive the appellant, if successful, of the result of the appeal, then it becomes the duty of the Court to interfere and suspend the right of the successful party. That, in the view of Cotton LJ, applied equally to the case where action has been dismissed and to the case where a decree has been made establishing the plaintiff's title. He also cited *Erinford Properties Ltd. v. Cheshire County Council* [1974] 2 All ER 448 where Megarry J applied the dictum in *Polini v. Gray* and held that a Judge who dismissed an interlocutory motion for injunction has jurisdiction to grant

the unsuccessful applicant an injunction pending appeal against such dismissal in order to prevent the Court of Appeal's decision from being rendered nugatory should it reverse the Judge's decision.

By applying the principle, the learned Judge in the instant case concluded by way of implication that the Court has power to suspend the effect of the *ex parte* interlocutory injunction granted on 20 November 1986 pending the hearing of the application to set it aside. With respect, we do not agree. We do not consider it to be applicable to the instant case. In the first place, the authorities cited relate to cases where there were appeals pending against the judgment or order of the Court below. In other words, the aggrieved party was exercising his right of appeal. Secondly, the discretionary power of the Court in granting stay of execution of the order appealed against is as provided by the rules of Court. Order 55 r. 12 RHC 1980 states that an appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order. There are other rules which provide discretionary powers to the High Court to stay the execution of its judgment or order on ground of matters occurring since the date of judgment or order as in O. 45 r. 11 RHC and to stay execution by writ of seizure and sale as in O. 47 r. 1 RHC. However, no such rule is provided in the RHC enabling the High Court to exercise its discretionary power to grant suspension or stay of execution of an interim injunction pending the disposal of the application to set it aside. Has the Court any jurisdiction to exercise its inherent powers in the instant case? Order 92 r. 4 RHC provides:

> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the Court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provision making available sufficient remedies, the Court will not invoke its inherent powers. The most obvious remedy available in this case was the application to set aside the interim injunction which ought to have been heard early in lieu of the application to suspend the injunction. That is because an *ex parte* injunction is usually required immediately and such application will not be granted unless it is made by the plaintiff promptly. In normal practice, an early date is fixed for inter-party hearing for the purpose of injunction until the trial of the action. Similarly, the Court should be prompt in exercising its discretionary power to set aside an order made *ex parte* under O. 32 r. 6 RHC. Delay would defeat the real purpose of the rule.

We are further of the opinion that it was not necessary in the circumstances of the case for the application to be heard by the same Judge who granted the injunction. Another Judge could hear it. There was no necessity at all for the order to suspend the injunction pending the hearing of the application to set it aside because it was tantamount to setting aside the injunction before the actual application is heard and might render a situation in which the Court would have to exercise its inherent powers to interfere in order to prevent an abuse of its process.

The learned Judge also cited *Shelfer v. City of London Electric Lighting Company* [1895] 2 Ch 388 where on appeal the Court of Appeal granted an injunction but suspended its operation for a certain time. Another application for further suspension was rejected by the Judge but the Court of Appeal held that the application might be made to and disposed of by the Judge to whose Court the action was attached.

Here again it should be noted that the case went on appeal against the decision of the Judge and the suspension of the operation of injunction was allowed firstly pending appeal and later pending compliance to do works in order to abate the nuisance complained of. It is not clear whether the Court of Appeal was exercising its inherent power or acted under any rules of Court. However, in so far as our position is concerned, s. 44 of the Courts of Judicature Act 1964 provides similar powers:

(1) In any proceeding pending before the Supreme Court any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of the parties pending the hearing of the proceeding, any order for security of costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Supreme Court.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Supreme Court.

(3) Every order so made may be discharged or varied by the full Court.

This case, in our view, has no bearing on the present case to justify reliance by the learned Judge. These are our grounds for allowing the appeal.

Also found at [1988] 1 CLJ 31